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In the Supreme Court of the United States

No. 618.

OCTOBER TERM, 1964.

EDWARD R. GODFREY and GEORGIA G. GODFREY,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 29, 1964.

OPINIONS BELOW.

The memorandum opinion of the Tax Court is reported at CCH 22 TCM 1 (1963) and is printed in Appendix to Petitioners' Brief, pp. 38a-47a.

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix B, *infra,* pp. 19-22) is reported in 335 F. (2d) 82.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 29, 1964 (Appendix B, *infra,* p. 19). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

(1) Can a taxpayer who is presently developing a high grade herd of cattle for future profit be said to be presently engaged in the cattle raising business so as to permit the deduction of losses under Section 165(c)(1) of the Internal Revenue Code of 1954?

(2) Did the Court of Appeals err in applying the "clearly erroneous" rule to an ultimate finding based on law as well as fact?

(3) Does the application of the "clearly erroneous" rule require a review of the entire evidence? If so, did the Court of Appeals review the entire evidence in this case?

(4) Is an ultimate finding "clearly erroneous" when it is supported by only two factual inferences and those inferences are contradictory?

(5) During the taxable years involved, did Petitioner's activities in connection with the raising and developing of a herd of registered polled Hereford cattle to produce breeding stock for sale constitute the conduct of a trade or business within the meaning of Section 165(c)(1) of the Internal Revenue Code of 1954?

STATUTES AND REGULATIONS INVOLVED.

The statutory provision involved is Section 165 of the Internal Revenue Code of 1954 and the Regulations involved are Treasury Regulation 118, Section 39.23(a)-11, and Treasury Mimeograph 6030, 1946-2 CB 45, all of which are set forth in Appendix A, *infra*, pp. 14-16.

STATEMENT.

Two issues were before the courts below, and this petition for the writ of certiorari is confined to the matter of the deductibility of farm losses for income tax purposes during the taxable years 1955, 1956, and 1957 by the petitioners (Issue No. 1).

During the years 1955, 1956 and 1957, and for several years prior thereto, petitioners operated and resided on a farm in southwestern Ohio. As a result of an income tax audit, the Commissioner disallowed losses in operation during said years. Petitioners filed suit in the Tax Court under date of May 31, 1960 (Appendix to Petitioners' Brief 1a), a hearing was held on September 27, 1961, and the Tax Court Memorandum Decision (R. pp. 38a-47a) was entered January 3, 1963 (2a). On March 25, 1963, Petitioners filed petition for review with U. S. C. A —6th Circuit (2a), the case was argued February 6, 1964, and the decision entered July 29, 1964 (Appendix B, *infra*, p. 19).

1. The Facts.

Edward R. Godfrey and Georgia G. Godfrey (Petitioners) are husband and wife. In 1943, while Edward R. Godfrey was employed by General Motors Corporation at Dayton, Ohio, Petitioners purchased a farm of 109 acres and chattels near Franklin, Ohio at a cost of $38,000. The farm was in a "run-down condition." The farm acquisition included a small herd of Jersey cattle and Petitioner hired the herdsman, purchased additional Jersey cattle and began a milk (dairy) operation. Petitioner contacted the local County Agent, Department of Agriculture, studied farm magazines, sent soil samples to Ohio State University and the University of Illinois and secured their recom-

mendations as to pasture fertilization and crop rotation and followed these recommendations. Petitioner continued the milk operation, and in late 1945, on the recommendation of farmer friends who were in the cattle business, decided to raise registered polled Hereford cattle for sale to breeders for herd improvement and purchased 8 brood cows and a bull to begin Hereford operations. The dairy and the Hereford cattle operations were conducted simultaneously. In 1947 Petitioner prepared a forecast which indicated that when the Hereford herd reached a size of 100 brood cows in 10 or 12 years, the Hereford operation would be profitable. Petitioner continued both operations until 1950, when, as a result of employee carelessness in handling the dairy cattle, he concluded that he should concentrate on raising registered Hereford cattle and sold the Jersey herd. In 1951, Petitioner purchased 27 acres of adjoining land and facilities.

Petitioner was extremely unfortunate in developing a herd from a production standpoint. In 1947, 1948 and 1949, 15 of the 19 animals born were male animals rather than the normal "drop" of 50% male and 50% female. Furthermore, the 1954 and 1957 "drop" were not top grade animals and some of the brood cows turned out to be non-breeders; thus, since high grade animals were the objective, the required culling further delayed the herd's reaching its full growth as originally projected. In 1957, at which time Petitioner had a herd of 58 animals, he again prepared a new estimate and forecasted a profitable operation within four years. Petitioner considered the need to lease pasture and purchase feed in his forecast of profit operations. The herd was appraised by an experienced Hereford cattleman in 1958 as being worth between $20,000 and $25,000. In 1959, Petitioner sold the herd and contracted to sell the farm property in order that he might

meet obligations pertaining to Florida real estate investments.

Petitioner stated that he at all times fully expected to make a profit from the operation of the farm. The Petitioner employed an accountant, maintained herd records and detailed accounting records for all of the years of farm operation. Petitioner, from 1943 through 1957, expended $79,436.01 in improving the farm, farm buildings and in the purchase of machinery and equipment. Petitioner's farm facilities were not elaborate but were adequate and practical. Since Petitioner was in the process of building a herd, he did not advertise animals for sale nor exhibit at cattle shows. However, he did register all of the animals except the culls.

Petitioner and his wife resided on the farm from date of purchase (1943) until 1948, when Petitioner was transferred to Detroit, Michigan. From 1948 to 1955, Petitioner spent three out of four weekends per month at the farm. Petitioner lived on and devoted full time to the farm from June 1, 1955, his retirement date, to 1959 (including the years here involved), with the exception of the small amount of time devoted to the management of his Florida real estate investments.

During the years involved, the residence had 12 rooms and there was also a guest house that had three rooms. Petitioner and his wife alone occupied the residence and did no extensive entertaining. The farm was not equipped with recreational facilities.

2. The Decisions Below.

Petitioner asserted that the operation of the farm for the raising and developing of a herd of registered polled Hereford cattle to produce high grade breeding stock for sale constituted the conduct of a "trade or business" with-

in the meaning of Section 165(c)(1) of the Internal Revenue Code of 1954, so as to permit losses incurred in connection with such activities during the taxable years 1955, 1956, and 1957, for Federal income tax purposes. The Tax Court denied the claim holding that "the expenses incurred in building up his herd were, accordingly, in preparation for his future entry into a cattle-raising business for profit, and such being the case, it cannot be said that at the time the expenses here involved were incurred, petitioner was already in the cattle-raising business."

The Tax Court memorandum decision was appealed to the U. S. C. A. Sixth Circuit, as being contrary to law and fact. The U. S. C. A. Sixth Circuit affirmed the Tax Court memorandum decision stating the review of the decision "must be quite restricted," and the Tax Court's conclusions on factual issues must be accepted unless they are clearly erroneous.

REASONS FOR GRANTING THE WRIT.

The decision below established a new rule of law affecting an important question of federal tax administration not only to the petitioners here but to many taxpayers similarly situated. This decision affects every owner of a farm, ranch or orchard which is presently in the development stage but which has not yet become profitable.

Moreover, the decision of the Court of Appeals for the Sixth Circuit incorrectly interprets a decision of this Court with respect to review of lower court decisions which is of vital importance to the appellate system. Review is sought for two "specified and important" reasons which justify this Court's exercising its discretionary jurisdiction:

(1) to resolve the conflict inherent in the Tax Court decision with other judicial authorities;

(2) to clarify the proper application of the "clearly erroneous" rule.

(1) The first reason, raised in Question 1, is readily apparent from the findings of the Tax Court. The Tax Court found as an ultimate fact: "Petitioner was not during any of the taxable years involved, engaged in a business of breeding, raising and selling cattle." This finding is based on a new standard of law for cases of this type—a standard embodied in the following language from the Tax Court's decision:

> "In our view, the most that can be said of petitioner's cattle-raising activities during the taxable years involved (as well as all prior years) is that he was endeavoring to build up a herd of animals that he hoped would eventually enable him to engage in a cattle business that *might* prove profitable at some future time. The expenses incurred in building up his herd

were, accordingly, in preparation for his future entry into a cattle-raising business for profit; and such being the case, it cannot be said that at the time the expenses here involved were incurred, petitioner was already in the cattle-raising business."

Thus, according to the Tax Court, a taxpayer who is presently developing a herd for *future* profit cannot be presently engaged in business. All of the judicial decisions and administrative rulings on this point are to the contrary.

In *Theodore Sabelis v. Commissioner*, 37 T. C. 1058 (1962), acquiesced in by Commissioner of Internal Revenue, 1962-41, I. R. B. 6, the Tax Court, in holding for the taxpayer, said

"That there was no net profit in the years in question is not determinative since the evidence supports the inference that the business had a profit potential from the breeding, sale and training of horses even though some time might elapse before realization of net profit."

In *John S. Ellsworth v. Commissioner*, 21 T. C. M. 145 (1962), the Tax Court distinguished the development of a breeding operation from a standard operation and recognized the proposition that, during the development period, operations would be at a loss. The Court found as facts

"The minimum amount of time required to prove * * * a breeding herd would be 12 to 15 years. A breeding operation is carried out with the expectation of eventually selling breeding stock at substantial prices." (page 146.) In the opinion the Tax Court stated—"that Petitioner was about 65 years of age in 1948 when he commenced his selective breeding enterprise and would be 75 or 80 before he could make a profit, in our opinion is not determinative of the issue." (page 151.)

In *Claude D. Dickerson,* D. C. Tex. 61-1, U. S. T. C. 9189 (1960), although the taxpayer had experienced continuous losses over a period of thirteen years in a Hereford cattle breeding operation, the Court in allowing the losses for the last three years found that during the development period losses were to be expected and further that, except for difficulties experienced, a profit probably would have been realized within ten years.

In *George M. Zeagler v. Commissioner,* 17 T. C. M. 457 (1958) it was held that under normal conditions it takes as many as 10 to 15 years for a cattle operation to ripen into a profitable business.

The Government's brief in *Bernard B. Carter, et al. v. Commissioner,* 257 Fed. (2d) 595 (CA-5-1958) states

> "the cases show that the development of a good breeding herd requires years * * *." (page 599.)

To the same effect that, during the period of developing and establishing a herd, losses are to be expected, see *Commissioner v. Marshall Fields,* 67 Fed. (2d) 876 (CCA-2-1933); *Wilson v. Eisner,* 282 Fed. 38 (CCA-2-1922). Here, the Division Judge treats herd development expenses as "investigatory, pre-opening or preparatory" expenses, thereby creating a new rule of law for all cases of this type to the effect that a taxpayer presently developing a herd for future profit is not engaged in business for profit.

The three definite periods in the life of a farm, ranch, orchard or grove are (1) preparatory, (2) development and (3) productive. The Internal Revenue Service, prior to and during the years in question, recognized the distinction. Preparatory expenses (with the exception of soil and conservation expenses after 1954) were required to be capitalized; current expenses during the development

period were permitted to be capitalized or deducted as expenses at the election of the taxpayer. Mim. 6030, 1946-2 C. B.-45, Reg. 111, Sec. 29.23(a)(11), Reg. 118, Section 39.23(a)(11), and Reg. 1.162-12 (Appendix A, *infra*, pp. 14-16) and Statement by Honorable Douglas Dillon, Secretary of the Treasury before the Committee on Ways and Means of the House of Representatives. (Appendix A, *infra*, pp. 16-18.)

In this case the Tax Court Division Judge has concluded that there are only two periods in the life of a cattle farm—(a) preparatory and (b) productive; thus, until a herd reaches that point in size or quality at which it might be expected to currently produce a profit, the herd owner is merely preparing to enter into business.

The cases cited by the Tax Court in its opinion (*George C. Westervelt*, 8 T. C. 1248; *Robert J. Wallendal*, 31 T. C. 1249) are further evidence that the Court has failed to recognize the distinction between preparatory and development expense. Both cases involve preparatory expenses and are not relevant here.

This Court remanded to the District Court the case of *Alden D. Stanton v. U. S.* (363 U. S. 278) because the District Court had not indicated "the legal standard with which the trier of fact has approached his task." (p. 292.) In this case, the Tax Court has indicated the legal standard with which it approached its task, and the legal standard is incorrect. If this decision is permitted to stand, a point of tax law thought long settled will become an arena of controversy and confusion.

(2) As to the second question, seemingly, the Court of Appeals and the Respondent recognize the error of law in the Tax Court's position, for both studiously avoid comment on the point, and attempt to justify the Tax Court's

ultimate finding on other grounds. It cannot be denied, however, that the Tax Court's ultimate finding is based, at least in part, on an erroneous concept of the law. As the Court said in *Owens v. Commercial Union Fire Insurance Co. of New York*, 211 Fed. (2d) 488 (CA 4-1954), "The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact." We submit that the Court of Appeals erred in applying the "clearly erroneous" rule to the Tax Court's ultimate finding in this case.

(3) A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364, 395; cf. *Commissioner v. Duberstein*, 363 U. S. 278, p. 291.

If a reviewing court must review "the entire evidence" to hold that a finding is clearly erroneous, it necessarily follows that a reviewing court must review the entire evidence to hold that a finding is not clearly erroneous. If this is not so, and a reviewing court may confine itself to a determination that there is some connection between the ultimate finding of the lower court and the basic facts found by the lower court, the review function is effectively nullified.

A review of the entire evidence is particularly important in the instant case, for Petitioner pointed out to the Court of Appeals that the Tax Court had not considered the entire evidence, and had abused its fact-finding discretion by ignoring much of the evidence presented by Petitioner and admitted at the Tax Court hearing—evi-

dence which other courts have considered to be not only relevant, but material to a determination of whether a taxpayer is engaged in business (unforeseen difficulties experienced, *Claude D. Dickerson, supra*) (accounting and herd records, *Dan R. Hanna, Jr.*, 10 T. C. M. 567).

Yet, there is nothing in the Court of Appeals' decision in this case to indicate that the court reviewed the entire evidence. To the contrary, the decision begins with a recital of the facts "stated in the Memorandum Findings of Fact and Opinion of the Tax Court" and there is no further mention of basic facts or evidence.

The "clearly erroneous" rule was promulgated for the benefit of the Court of Appeals, but the prerequisite for its use is a review of the entire evidence. We submit that a Court of Appeals, before applying the clearly erroneous rule, must indicate in its decision that it has met that prerequisite.

(4) The Tax Court's ultimate finding is based on two contradictory factual conclusions. The Tax Court found (1) that the expenses incurred by taxpayer in building up his herd were "in preparation for his future entry into a cattle-raising business for profit" (Appendix to Petitioners' Brief, 46a) and (2) that Petitioner's primary purpose in buying and developing the farm was "to gratify his desire to establish a substantial country estate" (Appendix to Petitioners' Brief, 47a). Obviously, if Petitioner was preparing to enter into business for profit, he must necessarily have had a profit motive, whereas the gratification of a desire to own a substantial country estate precludes a profit motive.

The Court of Appeals and the Respondent have ignored finding (1) above, thereby avoiding the factual con-

tradiction and the erroneous legal concept (previously discussed herein) embodied in that finding. The clearly erroneous rule is based on a presumption of fact-finding competence on the part of the trial judge. When, as here, the two major factual premises supporting the ultimate finding are contradictory, that presumption is not valid and the "clearly erroneous" rule does not apply.

CONCLUSION.

The United States Court of Appeals for the Sixth Circuit has erroneously affirmed a Tax Court Memorandum Decision which is in error on a question of substantial importance in the administration of the revenue laws which, for the reasons stated, warrants review at this time by the Court. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL J. BUCKLEY,
Attorney for Petitioner.

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Of Counsel.

APPENDIX A.

STATUTES AND REGULATIONS.

Statutes.

INTERNAL REVENUE CODE OF 1954:

SEC. 165. LOSSES.

(a) *General Rule.*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(c) *Limitation on Losses of Individuals.*—In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) losses incurred in a trade or business;

Treasury Regulations on Income Tax (1939 and 1954 Code).

REG. 118, SECTION 39.23 (a)-11. EXPENSES OF FARMERS.

A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming. The cost of ordinary tools of short life or small cost, such as hand tools, including shovels, rakes, etc., may be deducted. The cost of feeding and raising livestock may be treated as an expense deduction, in so far as such cost represents actual outlay, but not including the value of farm produce grown upon the farm or the labor of the taxpayer. Where a farmer is engaged in producing crops which take more than a year from the time of planting to the process of gathering and disposal, ex-

penses deducted may, with the consent of the Commissioner (see Section 39.41-2), be determined upon the crop basis, and such deductions must be taken in the year in which the gross income from the crop has been realized. The cost of farm machinery, equipment, and farm buildings represents a capital investment and is not an allowable deduction as an item of expense. Amounts expended in the development of farms, orchards, and ranches prior to the time when the productive state is reached may be regarded as investments of capital. Amounts expended in purchasing work, breeding, or dairy animals are regarded as investments of capital, and may be depreciated unless such animals are included in an inventory in accordance with Section 39.22 (a)-7. The purchase price of an automobile, even when wholly used in carrying on farming operations, is not deductible, but is regarded as an investment of capital. The cost of gasoline, repairs, and upkeep of an automobile if used wholly in the business of farming is deductible as an expense; if used partly for business purposes and partly for the pleasure or convenience of the taxpayer or his family, such cost may be apportioned according to the extent of the use for purposes of business and pleasure or convenience, and only the proportion of such cost justly attributable to business purposes is deductible as a necessary expense. If a farm is operated for recreation or pleasure and not on a commercial basis, and if the expenses incurred in connection with the farm are in excess of the receipts therefrom, the entire receipts from the sale of products may be ignored in rendering a return of income, and the expenses incurred, being regarded as personal expenses, will not constitute allowable deductions. (See also Sections 39.22 (a)-7, 39.23 (e)-5, and 39.23 (1)-10.)

Mim 6030, 1946-2 CB 45.

AMOUNT EXPENDED IN DEVELOPMENT OF FARMS, ORCHARDS AND RANCHES.

It is the position of the Bureau that a correct interpretation of section 29.23 (a)-11 of Regulations 111 gives the taxpayer the option to capitalize, prior to the time when the productive state is reached, expenditures incurred during the period of development which might otherwise be deductible as current expenses but it does not permit capital items to be treated as ordinary and necessary business expenses.

Expenditures incurred during the development period which represent ordinary and necessary expense items as an incident of current operations * * * may * * * be either capitalized or deducted at the election of the taxpayer.

Statement by Honorable Douglas Dillon, Secretary of the Treasury, Before the Committee on Ways and Means of the House of Representatives, on the President's Special Message on Tax Reduction and Reform, Wednesday, February 6, 1963, 10:00 A. M. EST.

* * * * *

6. *Other definitional problems.* Remedial legislation is also required in a variety of other capital gains areas. These include certain gains derived from the sale of livestock, citrus groves and similar farm property, patents, various types of royalties, installment sales, and life estates.

Further details of these proposals in the capital gains area are spelled out in the technical explanation. The proposals as to livestock, citrus groves, and other farm property are carefully limited to abuse cases of persons

with large amounts of non-farm income who convert ordinary income into capital gains by charging farm expenses against other income and then realizing capital gains from the values created by these expenses.

And the Pertinent Part of the Technical Explanation of the President's Recommendations Submitted to the Committee.

c. *Property used in the trade or business of farming Excess deductions account*

Pursuant to the President's recommendations regarding capital gains definitional changes, it is proposed to treat gain from the disposition of property used in the trade or business of farming as ordinary income to the extent that such gain may be attributable to farm deductions which were allowed to offset high-bracket nonfarm income. This proposal will have little, if any, effect upon regular farming operations. Rather, it is aimed at the practice engaged in by some taxpayers with high-bracket salary or other nonfarm income of securing a tax advantage by investing in farm activities which tend to produce losses in the early years of investment but which subsequently give rise to capital gains income.

One example is the raising of livestock. Under existing law, the sale of livestock held for dairy, breeding, or draft purposes may be accorded capital gains treatment. An investor may purchase such livestock and deduct the expenses attributable to their care and maintenance. In addition, he is entitled to depreciation deductions with respect to the cost of the herd. These deductions offset the taxpayer's high-bracket nonfarm income. Later, the herd may be sold at a capital gain taxed at the capital gain rate. Even though the investor may have enjoyed no profit from

the transaction computed before taxes, or indeed may have actually suffered a loss, the difference in the rate of tax on high-bracket ordinary income and capital gains income makes possible a substantial after-tax profit. Similar advantages may be secured by investing in the development of citrus groves, fruit trees or similar income-producing trees or plants, which do not produce income during the period when the trees or plants are being grown but which, when they mature, produce regular crops of fruits, nuts, grapes, or berries.

* * * * *

Example

The taxpayer owns a farm with respect to which, in 1964, deductions exceed income by $8,000. In addition, the taxpayer receives an annual salary as a corporate executive in a manufacturing corporation of $100,000. The taxpayer has no other income. In 1965 the farm produces net ordinary income of $1,000 and, in addition, a prize bull, which has a zero basis, is sold for $1,500 in a sale which would qualify for capital gains treatment under existing law. In 1966, the taxpayer retires and receives ordinary income of $12,000 from a retirement annuity; and the farm shows a net loss of $3,500. In 1967, the taxpayer sells the entire farm, which has an adjusted basis of $20,000, for $32,000 in a sale which would qualify for capital gains treatment under existing law.

* * * * *

APPENDIX B.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered July 29, 1964.)

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

LESTER L. CECIL,
United States Circuit Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before: CECIL and O'SULLIVAN, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

CECIL, Circuit Judge. This case is on petition for review from a decision of the Tax Court. The first issue before us involves the question of whether the losses incurred in the cattle-raising activities of the petitioner, Edward R. Godfrey, are deductible as business expenses for the taxable years 1955, 1956 and 1957. The petitioners, Edward R. Godfrey and Georgia G. Godfrey, filed joint returns during the years in question. This review concerns only Mr. Godfrey whom we will refer to as the taxpayer or petitioner.

The facts are stated in the Memorandum Findings of Fact and Opinion of the Tax Court reported at 22 CCH TCM 1. The facts may be briefly stated as follows: The

petitioner was an executive of General Motors Corporation and in 1943 he was transferred from Anderson, Indiana, to Dayton, Ohio, where he became factory manager of the corporation's Frigidaire Division. Subsequently, he became general manager of that division.

In 1943 the petitioner purchased a farm of 109.27 acres of land in Warren County, Ohio, about seventeen miles from his place of employment. He then made his home in the residence of this farm until 1948. At that time he was transferred to Detroit, Michigan, where his employment required him to be until he retired in 1955. During this period he spent three weekends out of four each month on the farm. Considering the original purchase price, the improvements to the residence and farm, the purchase of additional farm machinery and equipment and the purchase of an additional tract of twenty-seven acres of land, the petitioner had an investment of approximately two hundred thousand dollars. At the time of the purchase, he had no experience in farming and his knowledge of farm operations was meager.

A small herd of Jersey cattle was on the farm at the time of the purchase. The petitioner supplemented this herd with the purchase of some additional Jersey cattle and conducted an operation for the production and sale of milk. He sold all the Jersey cattle in 1950 and discontinued the production of milk. In 1945 he decided that the breeding, raising and selling of polled Hereford cattle would constitute the best use of his farm. He thereupon bought eight cows and one bull at a cost of $2,785. He estimated that it would require a herd of one hundred animals to operate at a profit and that it would take ten to twelve years to develop a herd of that size through the natural increase method. In 1957 the petitioner made a revised estimate that it would be 1961 or 1962 before he could

hope to have a herd of 100 animals. In order to make a profit after reaching this goal he estimated that he would have to have a calf yield of sixty-five per year, sell sixty animals per year, at $400 each, and hold his operating expenses to $20,000 per year. He never achieved any of these goals. At the beginning of the year 1958, there were sixty animals in the herd.

In January, 1959, the petitioner sold his herd, consisting of fifty-four animals, for $12,600. He sold the farm, including all of the land, residence, farm buildings and equipment for $210,000 in January of 1960.

The petitioner's losses for the taxable years in question were: 1955, $15,968.12; 1956, $14,406.68, and 1957, $16,945.07. He seeks to deduct these losses as expenses incurred in a trade or business. Section 162(a), Title 26, U. S. C., allows the deduction of "ordinary and necessary expenses * * * in carrying on any trade or business," and Section 165(c)(1), Title 26, U. S. C., provides that "losses incurred in a trade or business" may be deducted. Section 1.162-12 of Income Tax Regulations provides: "A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming." (Not applicable to a farm operated for recreation or pleasure.)

Whether a farm is operated for profit or pleasure is determined, for income tax purposes, from the primary or dominant purpose of the taxpayer. *Hirsch v. Commissioner*, 315 F. 2d 731, 736, C. A. 9, and cases there cited; *Wright v. Commissioner*, 274 F. 2d 883, C. A. 6; *White v. Commissioner*, 227 F. 2d 779, C. A. 6. Did the taxpayer have a dominant motive to make a profit? This is a factual question and must be determined from all the facts and circumstances surrounding the taxpayer's purchase, use

and operation of the farm. Many factual considerations enter into the ultimate finding of whether the taxpayer reasonably, and in good faith, was dominated by the profit motive.

The Tax Court found as an ultimate fact: "Petitioner was not, during any of the taxable years involved, engaged in a 'business' of breeding, raising and selling cattle." It concluded: "We believe from our consideration of the evidence, that petitioner's primary purpose in buying and developing the farm as a whole, was not to establish a business with which to augment his already large income, but rather to gratify his desire to establish a substantial country estate."

Our review in this field of litigation "must be quite restricted" and we must accept the Tax Court's conclusions on factual issues unless they are clearly erroneous. *Commissioner v. Duberstein,* 363 U. S. 278, 290, 291. Being unable to say that the factual findings of the trial court are clearly erroneous, the judgment of the Tax Court is affirmed on this issue of the case.

* * * * *

The judgment of the Tax Court is in all respects affirmed.

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Office-Supreme Court, U.S.
FILED

In the

EDWARD [illegible],

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 618

EDWARD R. GODFREY and GEORGIA G. GODFREY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a retired corporate executive, incurred substantial losses during 1955, 1956, and 1957 in raising and selling beef cattle on a farm that was also his residence. The Tax Court disallowed petitioner's claimed deductions for the losses, finding that "petitioner's primary purpose in buying and developing the farm as a whole, was not to establish a business with which to augment his already large income, but rather to gratify his desire to establish a

substantial country estate" (R. 47a). The court of appeals, upholding the finding as not clearly erroneous, affirmed. That holding, dispositive of the case, presents only a question of fact not warranting review by this Court.

The petition is directed primarily to a further comment of the Tax Court suggesting that, even if petitioner had been motivated primarily by the prospect of ultimately reaping a profit, the expenditures during the years in question would nevertheless be nondeductible as expenses incurred in "preparing" to enter, rather than "in carrying on," a business. If a holding at all, the comment was at most an alternative ground for decision. The court of appeals did not rely on that ground, and its affirmance of the primary ground for the decision—the lack of a business motive—is dispositive of the case. The question argued by petitioner is therefore not presented.

The petition for certiorari should be denied. Respectfully submitted,

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NOVEMBER 1964.

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